IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

CIVIL REVISION APPLICATION No 1282 of 1991

Hon'ble MR.JUSTICE Y.B.BHATT

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1. Whether Reporters of Local Papers may be allowed to see the judgements? : YES

2. To be referred to the Reporter or not? : YES

3. Whether Their Lordships wish to see the fair copy of the judgement? : NO

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO

5. Whether it is to be circulated to the Civil Judge? : NO

MOHAMMEDBHAI S SHEIKH

Versus

VRAJLAL MATHURDAS

Appearance:

MR GR SHAIKH with MR MAHBOOB M SHAIKH for Petitioner

MR JD AJMERA for Respondent

CORAM : MR.JUSTICE Y.B.BHATT

Date of decision: 27/12/2001

ORAL JUDGEMENT

1. This is a revision under section 29(2) of the Bombay Rents, Hotel and Lodging House Rates Control Act, 1947 at the instance of the original plaintiff landlord who had sued the respondent-defendant tenant for a decree of eviction of the rented premises under section 12 and 13 of the Bombay Rent Act.

2. The petitioner-landlord had sued the respondent-tenant for a decree of eviction on two grounds

viz. (1) that the tenant was in arrears of rent for more than six months on the date of the suit notice, and that the tenant had not paid up the amount within 30 days of receipt of the suit notice and (2) that the tenant had made a permanent construction on the rented premises without the prior written consent of the landlord.

3. The trial court, after taking into consideration the pleadings of the parties, framed appropriate issues, and after recording the evidence and hearing the learned counsel for the respective parties, rejected the landlord's claim for eviction on the ground that the tenant had made a permanent construction on the rented premises. However, the trial court found that the tenant was in arrears of rent of more than six months on the date of the suit notice, and had not paid up the said amount within 30 days of receipt of the said notice, that the case was covered by section 12(3)(a) of the Bombay Rent Act and therefore passed a decree for eviction. The trial court also passed a money decree in respect of the arrears of rent due to the landlord.

4. The respondent tenant being aggrieved by the decree of eviction passed against him by the trial court, preferred an appeal under section 29(1) of the Bombay Rent Act. The lower appellate court, after appreciating the evidence on record and after hearing the learned counsel for the respective parties, reversed the decree of eviction passed by the trial court.

5. It is this decree passed by the lower appellate court dismissing the suit of the landlord, which is the subject matter of the present revision.

6. This Court is conscious of the limited jurisdiction of the court while dealing with a revision under section 29(2) of the Bombay Rent Act. It is well settled law that this court in a revision under section 29(2) of the Bombay Rent Act cannot reappreciate the evidence, cannot sit in appeal over the impugned judgement and may not enter into a reappreciation of the evidence, even if a second view on the same set of facts is possible. However, it is equally well established that the revisional court can certainly interfere where the appreciation of evidence on the part of the lower court is grossly erroneous, and is such which would amount to a perversity in law, and if permitted to remain would amount to a travesty of justice.

7. On the facts of the case and in view of the law applicable to such facts, it is found that this is

precisely the situation in the present case. It is therefore necessary to interfere for the reasons stated hereinafter.

8. The landlord-plaintiff had filed the suit for eviction on the ground of arrears of rent on the basis of a statutory notice issued under section 12(2) of the Bombay Rent Act. The said notice is at Exh.25 dated 30th November 1978. The suit notice claims that the tenant was in arrears of rent of more than six months and such arrears amount to Rs.1404/-. These are the specific facts asserted in the suit notice, which must be kept in the forefront while examining other relevant facts and the appropriate law applicable to the established facts.

9. It is also pertinent to note that the suit notice makes no reference at all nor does it make any claim in respect of municipal taxes, education cess, electricity charges and/or any other heads which may or may not have been claimable by the landlord. This notice claims nothing except the aforesaid amount of Rs.1404/- being the arrears of rent at the rate of Rs.39/- per month.

10. The main contention of the defendant-tenant before the trial court was that the tenant had made certain specific payments, for and on behalf of the landlord, to the Guajrat Housing Board, who was claiming the said amounts from the landlord by way of instalments on the basis of the hire purchase agreement between the landlord and the said Board. There does not appear to be any dispute between the parties that the plaintiff landlord was an allottee in respect of the premises rented out to the defendant-tenant, and that the landlord was (at the relevant point of time) paying the purchase price of the said property by instalments to the Gujarat Housing Board. There does not appear to be any dispute on the question of fact that the tenant had in fact made certain payments to the Gujarat Housing Board. This is evidenced by Exh. Nos.55 to 59, 76 and 77, being the receipts of payment made by the defendant-tenant to the Guajrat Housing Board. This amount is asserted by the tenant to have been payments made by the tenant to the creditor of his landlord, and therefore a set off was claimed for the said amount under the provisions of section 20 of the said Act.

11. A plain reading of section 20 indicates that if the tenant had made payment on behalf of the landlord to a third party or once such payment is received on behalf of the landlord, such amount shall be recoverable by the tenant from the landlord, or be deducted by such tenant

from any rent payable by him to such landlord.

12. The trial court found that although such payments had been made by the tenant to the Gujarat housing Board, on its own interpretation of section 20, did not allow a set off to the tenant against the rent claimed against him by the landlord. It, however, requires to be noted that this is only one of the grounds on which the tenant was found to be in arrears of exceeding six months, and thus the decree passed against him by the trial court. The lower appellate court, in the appeal of the tenant, took a different view of section 20 and found that the payments made to the Housing Board by the tenant was on behalf of the landlord, against whom the Guajrat Housing Board had a legitimate claim. The lower appellate court, therefore, found that such payments made by the tenant to the Gujarat Housing Board were covered by section 20 of the Act.

13. On the facts of the case I am satisfied that the lower appellate court was entirely justified in applying the principle of section 20 and holding that the payments made by the tenant to the Gujarat Housing Board could be adjusted against the rent payable by the tenant to the landlord. However, the lower appellate court, while applying this principle, committed a fundamental error in not noticing and/or ignoring the time element. As aforesaid, the tenant can claim a set off in respect of the amounts paid to the Guajrat Housing Board for and on behalf of the landlord. This amount can certainly be claimed as a set off against the rent ultimately payable to the landlord. However, on the facts of the case (and there is no controversy on these facts) that on the date of the suit notice viz. 30th November 1978, the landlord had claimed Rs.1404/- as arrears of rent at the rate of Rs.39/- per month. However, even if the case put up by the tenant is accepted in toto (on the factual aspect of the payments made to the Gujarat Housing Board), it is found that these payments were made by the tenant between the year 1979 and 1982, and that the first of such payment was made on 20th November 1979.

13.1 It, therefore, emerges that on the date of the suit notice, absolutely no payment had been made by the tenant to the Gujarat housing Board. Obviously therefore no set off could be claimed by the tenant against arrears of rent claimed by the landlord on the date of the suit notice. No doubt, a set off would be available to the tenant, ultimately reducing his liability on the date of the decree, by this amount.

13.2 However, on these facts when the correct law is applied, it is found that in order to obtain the protection of section 12(3)(a) of the Bombay Rent Act, the tenant must pay to the landlord or deposit to the benefit of the landlord the amount claimed in the suit notice within 30 days of the receipt thereof. It could well be that the payment or deposit could be made under protest. It could well be that the payment or deposit could be made by the tenant reserving his right to challenge the amount claimed by the landlord. It is open to the tenant to pay only the amount which according to him is legally payable. It is also open to the tenant not to make such payment, and ultimately in the suit for eviction, establish by appropriate evidence that the claim made in the suit notice was not justified at all. However, this is a risk which the tenant takes. If the tenant takes the risk of not making payment, and ultimately fails to establish that the landlord's claim made in the suit notice was totally unjustified, a decree for eviction has to be suffered by the tenant.

13.3 On the facts of the case, it is an admitted position that the tenant had not made any payment whatsoever to the landlord, nor had made any deposit in any proceeding in any court, within 30 days of the receipt of the suit notice. Even thereafter, during the course of trial, the tenant has not led any evidence to establish that the claim made by the landlord on the date of the suit notice was not justified and/or was excessive. The only ground raised by the tenant in both the courts below in respect of the landlord's claim was to the effect that he is entitled to a set off in respect of the payment made to the Guajrat Housing Board. However, as aforesaid, such payments made by the tenant were considerably subsequent to the receipt of the suit notice by the tenant. Consequently the tenant cannot possibly get any set off for such payment against the suit claim. It is pertinent to note that even the lower appellate court, while allowing the appeal of the tenant has allowed it simply by applying the principles of section 20 of the Act without applying its mind as to whether the said principle would apply on the facts of the case. Furthermore, the lower appellate court has not applied its mind, possibly on account of the fact that no contentions were raised or submissions made by the tenant, to establish that the very claim of the landlord in the suit notice was unjustified.

14. Learned counsel for the tenant contended that section 12(3)(a) of the said Act would not have any application inasmuch as the tenant was also obliged to

pay municipal taxes and also education cess, which are annual payments, that therefore the rent could not be said to be rent payable by the month.

14.1 This contention would, no doubt, require to be accepted if it could be substantiated from the facts of the case. This is where an insurmountable difficulty is faced by the tenant.

14.2 First let us examine the pleadings of the parties. The suit notice at Exh.25 as also the suit plaint at Exh.1 claim only monthly rent at the rate of Rs.39/- per month. There is no reference at all, let alone any claim, on account of municipal tax or education cess or any other annual dues whatsoever.

14.3 Learned counsel for the tenant sought to rely upon the deposition of the defendant-tenant in support his submission that the liability to pay municipal tax or a portion thereof was upon the tenant. It requires to be noted that there is no written contract or Rent Note between the parties. Learned counsel for the tenant sought to substantiate this submission from the deposition of the defendant. Firstly it must be noted that the tenant has deposed in his examination in chief that after he surrendered certain part of the rented property to the plaintiff landlord, the landlord reduced the rent, which then became Rs.39/- per month. The defendant then clarifies that this rent of Rs.39 included all taxes, and the electric bill was to be shared one half by each. It is therefore obvious that as per the tenant's own assertion in his examination in chief, the rent was Rs.39/- per month inclusive of all taxes. However, learned counsel for the tenant sought to rely upon only a portion of the tenant's cross-examination. According to learned counsel for the tenant, the relevant portion of the cross-examination relied upon would mean that when the rent was fixed at Rs.39/- per month, other taxes as also electric bill were to be shared, one half by each of them. In my opinion, no matter how the relevant portion (the original is in Gujarati) is read, it is not possible to construe this portion as suggested by learned counsel for the tenant. The plainest possible meaning of the relevant portion would mean and can only mean, a plain statement made by the deponent, that there is no document to show that when rent was fixed at Rs.39/per month, other taxes and electric bills were to be shared equally by the parties. On a combined reading of the assertion of the tenant in his examination-in-chief as also by the tenant's statement in his cross-examination, it is not possible to accept the

contention of learned counsel for the tenant that the rent was Rs.39/per month and that municipal taxes were to be paid over and above this figure. The lower appellate court has correctly appreciated the entire evidence in arriving at the finding that the rent was Rs.39/- per month (inclusive of taxes).

14.4 It must also be noted that the record shows that the tenant had filed one application for standard rent under section 11 of the Rent Act. This application has been referred to on the record as Misc. Civil Application No.8/76. What was the fate of this application is not clear from the record of the proceedings. Learned counsel for the tenant has submitted that the outcome of this standard rent application would affect the figure of the rent being Rs.39/- per month inclusive of all taxes. This contention on behalf of the tenant cannot be accepted for the simple reason that, had the said standard rent application been pending either during the trial stage or even during the pendency of the appeal, the tenant would certainly have pointed out the same to the relevant court. Both the courts below have noted the fact and the number of the said application, but have not discussed the outcome of the said application, the only reason being that a favourable outcome of the said application could not be put forward by the tenant. Learned counsel for the landlord orally submitted that the said application was dismissed. However, there is nothing on record to support this submission, which even otherwise, in my view, cannot in any manner affect the crux of the matter which has been dealt with by the present decision. Even otherwise, if the said application had been decided on the relevant date, and had the decision therein been favourable to the tenant, the tenant would certainly have produced a certified copy of the judgement before the courts below. This has not been done. In this fact situation this court can only proceed on the basis, which is the basis adopted by both the courts below without contention or opposition, that the monthly rent was Rs.39/- per month inclusive of tax.

15. As aforesaid, learned counsel for the tenant sought to contend that because the rent includes an element of tax which is an annual feature, it cannot be said to be rent payable by the month and that therefore section 12(3)(a) would not apply to the facts of the case.

15.1 This contention cannot be accepted in view of the decision of the Supreme Court in the case of Raju Kakara

Shetty Vs. Ramesh Prataprao Shirole, reported in (1991) 1 SCC 570. In the said decision the Supreme Court has laid down the principles under which an agreement binding the parties, governing or providing for the tenant's liability to pay tax or any other annual payment, to be quantified on a monthly basis and to be included in the monthly rent, is to be interpreted. Where such annual payment is quantified on a monthly basis (and the monthly rent is thus a composite of the two obligations), it cannot then be said that the rent is not payable by the month, and that therefore section 12(3)(a) would apply to such a case. In other words, the Supreme Court has laid down in the said decision that merely because the rent includes the element of municipal tax does not mean that rent is not payable by the month. If the rent is fixed rent per month, the element of tax within such fixed rent makes no difference, and such fixed rent remains "rent payable by the month".

16. It was then sought to be contended that the suit notice was not legal within the meaning of section 12 of the Bombay Rent Act and that the suit should have been dismissed on this ground alone. It appears that this contention was urged before the trial court which resulted in the framing of issue no.5. However, the trial court found against the tenant and held that the suit notice is legal. Learned counsel for the tenant sought to criticise this finding of the trial court on the ground that it is a finding which is terse and laconic and without sufficient reasons. In any case, this is not a ground urged and argued by the tenant in the appeal before the lower appellate court. This is not to suggest that this contention cannot be raised here in the present revision. Even so, the contention against the suit notice as pressed before me is only to the effect that the tenant has in the suit notice claimed rent for the specific period of 11th November 1975 to 31st December 1978. In this context it is contended that when the suit notice was issued on 30th November 1978, the said notice cannot give rise legally to a claim for rent for the month of December 1978. This, however, is not a sustainable contention for the simple reason that when the suit notice is issued on 30th November 1978, it does not terminate the tenancy of the tenant on that day, nor does it terminate the tenancy of the tenant on the day when the suit notice is received. Obviously, the tenancy continues till the end of the month of tenancy commencing 15 clear days after the receipt of the suit notice.

17. The net result of this discussion is that when

the landlord claimed arrears of Rs.1404/- as arrears of rent of more than six months, and as seen above from the facts of the case, no payment was made within 30 days either to satisfy this claim or payment made in protest or under compulsion, the tenant must suffer the consequences contemplated by section 12(3)(a).

18. Learned counsel for the tenant also sought to raise another contention that the plaintiff is not entitled to a decree of eviction inasmuch as he is not the owner of the property. In this context, reliance was sought to be placed on the fact that the plaintiff was merely an intending purchaser from the Gujarat Housing Board, that the plaintiff was placed in possession of the property by the Gujarat Housing Board under a hire purchase agreement, and that until all the installments were paid by the plaintiff to the Housing Board, title would not pass to the plaintiff. Such a submission would not advance the case of the tenant any further. It is well understood by the parties and clear from the record that the plaintiff sues the defendant tenant not necessarily in his capacity as an owner of the property or because he claims to hold full title to the property. The plaintiff merely sues the defendant for possession in his capacity as a "landlord".

18.1 The concept of a landlord is clear and distinct, as opposed to a person having full title to the property, which is obvious from the definition of the word "landlord" as laid down by section 5, sub-section (3) of the said Act, which reads as under:

> 5(3) "Landlord" means any person who is for the time being, receiving, or entitled to receive, rent in respect of any premises whether on his own account or on account, or on behalf, or for the benefit of any other person or as a trustee, guardian, or receiver for any other person or who would so receive the rent or be entitled to receive the rent if the premises were let to a tenant; and includes any person not being a tenant who from time to time derives title under a landlord; and further includes in respect of his sub-tenant a tenant who has sub-let any premises;"

It is, therefore, obvious that even a person who does not hold full title of the property can legally be a "landlord" within the meaning of the Bombay Rent Act, and in that capacity, can both let out the property, recover rent and also to sue for recovery of possession. Even

otherwise, it is well settled law that if the tenant disputes the title of the landlord-plaintiff and fails to establish that the plaintiff is not the landlord within the meaning of the Bombay Rent Act, a decree for possession must necessarily follow ipso facto. In the present context the tenant has sought to challenge the capacity of the plaintiff as the "landlord", but has miserably failed to establish that the plaintiff was not the "landlord". Throughout the deposition of the plaintiff as also the defendant-tenant, it is found that the defendant has not only treated, but has accepted the plaintiff as the "landlord". This contention, therefore, cannot be sustained.

19. For the reasons stated hereinabove, the judgement and decree passed by the lower appellate court, allowing the appeal of the tenant is grossly erroneous, unjust, opposed to the established facts on record and is a perversity in law. Therefore it requires to be quashed and set aside. It is accordingly so directed. Consequently the present revision succeeds and is allowed. Rule is made absolute with costs.

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